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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

DISPATCHED

In the Matter of)	
)	
Closed Captioning and Video Description)	
of Video Programming)	
)	MM Docket No. 95-176
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	

REPORT AND ORDER

Adopted: August 7, 1997

Released: August 22, 1997

By the Commission: Chairman Hundt and Commissioner Chong issuing separate statements.

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I. INTRODUCTION

1. By this *Report and Order*, the Commission adopts rules implementing Section 713 of the Communications Act of 1934, as amended ("Communications Act").¹ Section 713, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996 ("1996 Act").² Section 713 generally requires that video programming be closed captioned. It requires the Commission to prescribe, by August 8, 1997, rules and implementation schedules for the closed captioning of video programming and to establish appropriate exemptions. In crafting rules to implement Section 713, we have endeavored to ensure that persons with hearing disabilities have access to video programming while at the same time taking into consideration the effect of our rules on the video programming industry.

2. Closed captioning is an assistive technology designed to provide access to television for persons with hearing disabilities.³ Closed captioning is similar to subtitles in that it displays the audio portion of a television signal as printed words on the television screen. To assist viewers with hearing disabilities, captions may also identify speakers, sound effects, music and laughter. Unlike subtitles, however, closed captioning is hidden as encoded data transmitted within the television signal.⁴ To view

¹ 47 U.S.C. § 613.

² Pub. L. 104-104, 110 Stat. 56 (1996).

³ For a more complete description of closed captioning, see *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Report, MM Docket No. 95-176, FCC 96-318, 11 FCC Rcd 19214 (1996) ("*Report*") and *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Notice of Proposed Rulemaking, MM Docket No. 95-176, 12 FCC Rcd 1044 (1997) ("*Notice*").

⁴ See 47 C.F.R. § 73.682(a)(22). In particular, closed-captioning information may be transmitted on fields one and two of line 21 of the vertical blanking interval ("VBI"). Standard television pictures are transmitted at a rate of 30 frames per second, with two interlaced fields comprising each frame. Each field begins with a VBI of 21 lines, during which the picture scanning beam is turned off (blanked) and is moved from the bottom of the screen to its starting position at the top of the screen. There are two VBIs transmitted per frame, one in each field. The placement of data within the VBI is described in terms of the particular blanking line used and the field (one or two) in which it occurs. See *Permissible Uses of the Vertical Blanking Interval*, Notice of Proposed Rulemaking, MM Docket No. 92-305, 8 FCC Rcd 90 n.1 (1992).

the closed captioning, a viewer must use a set-top decoder or a television receiver with built in decoder circuitry.⁵

3. The Commission's *Notice of Proposed Rulemaking* ("Notice") in this proceeding sought comment on proposed rules and implementation schedules to fulfill the statutory mandate of Section 713.⁶ In the *Notice*, the Commission discussed proposals intended to maximize the amount of programming containing closed captioning with appropriate exemptions and reasonable timetables to take into account the relevant technical and cost issues involved.⁷ We received 120 comments and 67 reply comments in response to the *Notice*.⁸

4. In Section II of this *Report and Order*, we set out the provisions of Section 713, discuss the objectives of Section 713 and summarize the rules adopted by the Commission to implement the statute. In Section III, we discuss the responsibility for compliance with the rules we adopt. In Section IV, we address obligations as to programming first published or exhibited after the effective date of our rules ("new programming") and programming first published or exhibited prior to the effective date of our rules ("pre-rule programming"), including phase-in schedules. In Section V, we discuss the measurement of compliance with the rules. In Section VI, we consider the exemptions authorized by Congress: (a) based on the "economically burdensome" standard; (b) based on existing contracts; and (c) under the undue burden standard. Section VII discusses standards for quality and accuracy of closed captioning. In Section VIII, we establish mechanisms for enforcement and compliance review. Finally, in Section IX, we address other issues relating to implementation of Section 713 and matters for future review.

⁵ Since July 1993, all television receivers with screen sizes 13 inches or larger must be capable of receiving and displaying closed captioning. See *Implementation of Television Decoder Circuitry Act*, Report and Order ("TDCA R&O"), GEN Docket No. 91-1, 6 FCC Rcd 2419, 2420 (1991), *recon. granted in part*, Memorandum Opinion and Order, 7 FCC Rcd 2279 (1992).

⁶ See *Notice*. Our proposals were based on comments and information submitted in response to a *Notice of Inquiry* in this proceeding and additional data gathered by the Commission for our *Report* to Congress on video accessibility. On December 1, 1995, the Commission adopted a *Notice of Inquiry* in this proceeding which sought comment on a wide variety of issues related to closed captioning and video description of video programming based on the legislation that was pending at that time. *Closed Captioning and Video Description of Video Programming*, Notice of Inquiry, MM Docket No. 95-176, FCC 95-484, 11 FCC Rcd 4912 (1996) ("Notice of Inquiry"). The 1996 Act, which was enacted on February 8, 1996, required the Commission to conduct an inquiry into the availability of video programming with closed captioning. See 1996 Act, Section 305. On February 27, 1996, the Commission announced its intention to use the comments filed in response to the *Notice of Inquiry* for the inquiries it was required to conduct on these issues pursuant to Section 305 of the 1996 Act and extended the period for filing comments. *Closed Captioning and Video Description of Video Programming*, Order, MM Docket No. 95-176, 11 FCC Rcd 5783 (1996). The *Report* was issued on July 29, 1996, pursuant to the requirements of Section 713(a).

⁷ H.R. Report 104-204, 104th Cong., 1st Sess. ("House Report") (1995) at 114.

⁸ Appendix A is a list of commenters.

II. SECTION 713

A. Statutory Requirements of Section 713

5. Section 713(b) requires the Commission to adopt rules within 18 months of enactment to ensure that:

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d); and

(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d).

Section 713(c) provides that:

Such regulations shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming.

Notwithstanding the provisions of Section 713(b), the statute permits certain exemptions of closed captioning requirements. Specifically, under Section 713(d):

(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.

Section 713(e) states that:

The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include --

(1) the nature and cost of the closed captions for the programming;

(2) the impact on the operation of the provider or program owner;

(3) the financial resources of the provider or program owner; and

(4) the type of operations of the provider or program owner.

In addition, Section 713(h) reads:

Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

6. As we previously stated, the provisions of Section 713 apply to all types of video programming delivered electronically to consumers, regardless of the entity that provides the programming or the category of programming.⁹ In the *Notice*, we stated that the proposed rules and implementation schedules for closed captioning requirements would apply to various distribution technologies used to deliver this programming to consumers, including over-the-air broadcast television service (both commercial and noncommercial) and all multichannel video programming distributors ("MVPDs"). Among these MVPDs are: cable television, direct-to-home ("DTH") satellite services, including direct broadcast satellite ("DBS") services and home satellite dishes ("HSD"); wireless cable systems using the multichannel multipoint distribution service ("MMDS"), instructional television fixed service ("ITFS") or local multipoint distribution service ("LMDS"); satellite master antenna television ("SMATV") services; and open video systems ("OVS").¹⁰

B. Background

7. Section 713 is intended to ensure that video programming is closed captioned and accessible to persons with hearing disabilities. The closed captioning of television programming began over 20 years ago and today is a common feature of much widely available and popular programming. Through the voluntary efforts of the video programming industry and with financial support from the Department of Education ("DOE") and private entities, a considerable amount of television programming is currently accessible to persons with hearing disabilities. As Congress recognized, there has been a significant increase in captioning since the enactment of TDCA of 1990, which required all television sets with screens of 13 inches or larger to have the capability to decode closed captioning.¹¹ However, as the

⁹ See *Notice*, 12 FCC Rcd at 1048 ¶ 5. See also H.R. Report 104-458 104th Cong., 2d Sess. ("Conference Report") (1996) at 183. No commenters disagreed with this interpretation. However, MPAA sought clarification that the rules will not apply to closed circuit video programming that is specially packaged for commercial or other non-residential consumers. MPAA Comments at 20-21. We will exempt from our rules any video programming that is produced for transmission solely through closed circuit distribution, but not video programming generally available to consumers' households that also is distributed through closed circuit or other private arrangements.

¹⁰ For detailed information regarding each of these distribution technologies, see *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report ("1996 Competition Report"), CS Docket No. 96-133, 12 FCC Rcd 4358 (released Jan. 2, 1997).

¹¹ "The Committee recognizes that there has been a significant increase in the amount of programming that has been closed captioned since the passage of the Television Decoder Circuitry Act of 1990. In particular, many network programs aired during prime time are captioned." House Report at 113.

number of channels of video programming continues to increase and the variety of program offerings expands, a large amount of video programming remains uncaptioned. As the legislative history notes, Congress was concerned "that video programming through all delivery systems should be accessible" ¹² In accordance with this congressional mandate, we seek to make closed captioning an integral part of video programming as soon as possible to provide persons with hearing disabilities with the same opportunity to share in the benefits provided by television programming that is available to others.

8. As we reported to Congress, virtually all of the prime time programming distributed by the six major national commercial broadcast networks (i.e., ABC, CBS, NBC, Fox, WB and UPN) is closed captioned.¹³ These networks also caption a significant amount of their other programming, including news, children's programming, daytime programming and sports.¹⁴ The Public Broadcasting Service ("PBS") captions all its children's programs, prime time programming and the *Newshour with Jim Lehrer* and requires the closed captioning of all programming funded by PBS' National Program Service.¹⁵ Furthermore, many local broadcast television stations caption their local programming.¹⁶

9. The nonbroadcast networks that are available to the greatest number of MVPD subscribers and achieve the highest viewing levels also caption many of their programs, especially those distributed in prime time.¹⁷ There is also a significant amount of captioned programming that is distributed by both broadcast and nonbroadcast video programming providers. The highest rated and most widely available first-run syndicated programs (e.g., *Oprah* and *Wheel of Fortune*) are closed captioned.¹⁸ Further, as newer network programming (e.g., *Roseanne* and *Seinfeld*) goes into syndication, an increasing number of these programs contain captions and some earlier off-network programs that remain popular have been captioned (e.g., *I Love Lucy*).¹⁹ Almost all widely-distributed motion pictures currently produced and distributed by member companies of the Motion Picture Association of America ("MPAA") are closed captioned for distribution over broadcast television, MVPDs and home video following their theatrical release.²⁰ Finally, many commercials are captioned by the advertising agencies that produce them.²¹

¹² House Report at 113-114.

¹³ Report, 11 FCC Rcd at 19238-19242 ¶¶ 62-65. See also House Report at 113.

¹⁴ Id.

¹⁵ Report, 11 FCC Rcd at 19238 ¶ 60.

¹⁶ Id. at 19241-19242 ¶¶ 67-69.

¹⁷ Id. at 19243 ¶ 71.

¹⁸ Id. at 19241 ¶ 67.

¹⁹ Id.

²⁰ Id. at 19246-19247 ¶ 79.

²¹ Id. at 19241 ¶ 66.

10. However, we note that during time periods other than prime time, the amount of closed captioning remains limited. There are approximately 165 national nonbroadcast networks, 50 regional nonbroadcast networks,²² and much locally originated programming offered by broadcast television stations and cable systems.

11. Section 713 and the rules we adopt in this *Report and Order* are intended to further increase the amount of programming with closed captions to expand the accessibility of video programming for persons with hearing disabilities. We recognize the important role that video programming plays in American society today as a source of information and entertainment. Thus, we seek to maximize the amount of video programming that is available to the 8.6% of the nation's population who are hearing disabled as rapidly as practical.²³ This goal is consistent with the statute and its legislative history that clearly indicate that Congress intended for video programming to be captioned and available to persons with hearing disabilities. At the same time, the statute directs us to consider the realities of the video programming marketplace, including the many programs yet to be captioned, the financial resources of video programming providers and current limitations on the supply of captioners. In order to balance the important need for closed captioned video programming against these market conditions, we consider a number of factors in developing rules to make video programming accessible as soon as possible.

12. First, we seek to increase the amount of closed captioned video programming incrementally over time. Our rules contain transition periods, during which the amount of closed captioned programming will increase. There is an eight year transition period for new programming, and a ten year transition period for pre-rule programming. In setting these deadlines, we have considered the limited number of available captioners and captioning services in existence, the increased demand for captioning which has been created by Section 713, and the cost of captioning. Allowing a transition period ensures that Section 713 is implemented in an efficient and practical manner. In addition, the rules require that any program received by a provider with captioning, and for which the captions do not require reformatting, must be passed on to consumers with the captions intact. We believe that these rules will ensure accessibility in a reasonable amount of time, with significant increases in captioning throughout these periods.

13. Second, we seek to have a wide array of video programming with captions, recognizing that persons with hearing disabilities desire as wide a choice of programming to be accessible as do members of the public generally. Under our rules, compliance is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many channels of programming now available. Further, while requiring increasing amounts of programming to be captioned until we reach the degree of accessibility provided by Section 713, our rules allow significant discretion in their implementation by video programming providers because we believe that video programming providers are in the best position to respond to the preferences of their viewers.

14. Third, we seek to promote competition among sources of video programming, consistent with the 1996 Act's overall intent. Our rules apply evenhandedly to all video programming providers and

²² *Cable Television Developments*, National Cable Television Association, Spring 1997 at 28-118.

²³ *Report*, 11 FCC Rcd at 19226 ¶ 31 citing National Center for Health Statistics, Current Estimates from the National Health Interview Survey, 1994, Series 10, No. 193, at 93, Table 62.

are not intended to intrude upon video programming providers' editorial decisions. In this manner, we maintain competition among video programming distributors regardless of the technologies used, continue to foster diversity of video programming and encourage new types of video programming to become available to all viewers.

15. Fourth, we seek to provide appropriate and reasonable exemptions, as required by Section 713(d), while ensuring that a substantial amount of programming gets captioned. The statute provides for exemptions where captioning would impose an economic burden. We exempt a limited number of programming types from the closed captioning requirements on the basis of economic burden. We also permit some smaller video programming providers to caption less than the specified benchmark amounts of their programming by permitting them to cap their spending on closed captioning, based on their gross revenues. Our rules also provide sufficient flexibility to consider unusual cases under the undue burden standard.

16. Fifth, we seek to adopt rules and procedures that are straightforward and easy to enforce with minimal administrative burdens on the Commission, affected industries and consumers. We adopt a relatively simple enforcement process that places a limited burden on the complainant and permits the video programming provider to demonstrate compliance without a significant paperwork burden.

17. Finally, we seek to place maximum reliance on competitive market forces to develop efficient and cost effective methods for captioning and for ensuring a high level of quality for all captions. Our rules recognize that time must be allowed for the video marketplace to adjust to these new rules. We are aware that those who distribute programming and their program suppliers must coordinate their efforts to determine the most efficient ways to caption programming. In situations where multiple entities in the distribution chain use the same programming, there is a need to determine the best means for captioning programming so that all will have access to such programming without duplication of effort. We also know that some programming providers may not have taken the costs of captioning into account when developing programming budgets. Yet, closed captioning must become an integral part of the production of new programming and programming providers need time to begin to incorporate captioning at the outset of the production process. We want to allow time for these entities to find sources of funding or sponsors to underwrite the additional costs of captioning. In addition, captioning resources must expand to meet the increased demand for captioned programming. While the number of captioners may be sufficient to meet current demand, it appears that we must allow time for the pool of captioners to grow, which is dependent on the training of additional stenocaptioners, and for the number of captioning agencies to increase to meet the demand for captioning of pre-recorded programming. Moreover, as competition for captioning services increases and new technologies are developed, the cost of captioning is likely to decrease. Accordingly, while it would be ideal to require all video programming to be captioned within a minimal amount of time, we must consider the realities of the marketplace and its need to adjust to the new requirements.

C. Summary of the Rules Adopted to Implement Section 713

18. The following summarizes the rules we adopt to implement the closed captioning requirements under Section 713, which become effective on January 1, 1998:²⁴

- Responsibility for compliance with captioning requirements: Section 713 refers to the closed captioning of programming by providers and owners of video programming. Because it is efficient and will focus responsibility for rule compliance, we will generally place the responsibility for compliance with our closed captioning rules on video programming distributors, defined as all entities who provide video programming directly to customers' homes, regardless of distribution technology used (i.e., broadcasters and MVPDs). Video programming distributors, however, will not be responsible for the captioning of programming that is not subject to their editorial control. The responsibility for compliance with respect to such programming will be placed on the providers and owners of such programming.

- Transition schedule:

- New Programming - Section 713(b)(1) requires the Commission to adopt rules to ensure that video programming first published or exhibited after the effective date of our rules ("new programming") be fully accessible through closed captioning. For new programming that does not meet any of our criteria for exemption, we adopt an eight year transition period with benchmarks specified as a number of hours of required captioning. We will define full accessibility as the captioning of 95% of all new, non-exempt programming to provide for unforeseen difficulties that may arise. Compliance will be measured on a channel-by-channel basis for MVPDs and will be measured over each calendar quarter. During the transition period, each channel of programming will be required to meet the specified benchmark unless the amount of new nonexempt programming offered on the channel is less than the benchmark. In such instances, at least 95% of the new, non-exempt programming on the channel will be required to be captioned. After the transition period, all channels will be required to caption 95% of their new, non-exempt programming.

We also will require video programming providers to continue to provide closed captioning at a level substantially the same as the average level of captioning that they provided during the first six months of 1997, even if the amount of captioned programming exceeds that required under the benchmarks. Video programming distributors are required to pass through to consumers any programming they receive with closed captioning, even if they have already met their benchmarks, when they do not edit the programming.

- Pre-rule programming - For video programming first published or exhibited on or before the effective date of our rules ("pre-rule programming"), Section 713 requires that we maximize the accessibility of such programming through the provision of closed captions. With respect to pre-rule programming that does not meet any of our criteria for exemption, at least 75% of such programming must contain closed captions after the end of a ten year transition period. Compliance will be measured on a per-channel, quarterly basis. We expect that the amount of captioning of such programming will increase incrementally over the transition period. While we will not set specific benchmarks as we are

²⁴ The rules are subject to approval of the Office of Management and Budget ("OMB"). The OMB approval process takes approximately 90 to 120 days. For ease of administration, we have designated an effective date of January 1, 1998. The rules are set forth in Appendix B.

doing for new programming, we will monitor distributors' efforts to increase the amount of captioning of pre-rule programming to determine whether channels are progressing toward the 75% requirement. After four years, we will reevaluate our decision not to establish specific benchmarks and will reevaluate whether the 75% threshold for maximizing the accessibility of pre-rule programming is the appropriate amount to meet the goals of the statute.

- Exemption based on economic burden: Section 713(d)(1) permits the Commission to exempt by regulation programs, classes of programs or services for which we determine a requirement to provide closed captioning will be economically burdensome. We will exempt from our closed captioning rules several specific classes of programs for which such requirements would be economically burdensome. These include non-English language programming, primarily textual programming, programming distributed between 2 a.m. and 6 a.m., interstitial announcements, promotional programming and public service announcements, advertising, certain locally-produced and distributed programming, non-vocal musical programming, ITFS programming and programming on new networks. We further exempt any video programming provider from closed captioning requirements where the provider has annual gross revenues of less than three million dollars. In addition, we will not require any video programming provider to spend more than 2% of its annual gross revenues on closed captioning. Under this provision, we minimize the economic burden of captioning video programming while at the same time requiring efforts to increase video accessibility by as many entities as possible.

- Exemptions based on existing contracts: We will exempt any programming subject to a contract in effect on February 8, 1996, for which compliance with the closed captioning requirements would constitute a breach of contract.

- Exemptions based on undue burden: Under Section 713(d)(3), the Commission is required to consider petitions for exemption from the closed captioning rules if the requirements would impose an undue burden, which is defined as a significant burden or expense. Parties shall file requests for exemption based on the undue burden standard. A petition may be submitted by any party in the programming distribution chain. Petitions must include information that demonstrates how the programming for which the exemption is sought meets one or more of the statutory criteria for undue burden exemptions. Petitioners may also submit any other information they deem appropriate for our evaluation of their situations. Depending on the individual circumstances, we may grant partial exemptions and may consider proposals that programming be made accessible through alternative means (e.g., additional text or graphics).

- Standards for quality and accuracy: Video programming providers will be required to deliver intact the closed captioning they receive as part of the programming they distribute to viewers where the captions do not need to be reformatted. Video programming providers must maintain and monitor their equipment to ensure the technical quality of the closed captioning they transmit. We will not adopt standards for the non-technical aspects of closed captioning. We will, however, monitor the captions that result from implementation of our rules, and, if necessary, revisit this issue at a later date. We will not establish any standards for captioners. We will not restrict the use of captioning methodology generally. Video programming providers may use the electronic newsroom ("ENR") method of closed captioning.

- The enforcement process: Complaints alleging violation of our closed captioning rules must first be directed in writing to the video programming provider responsible for distribution of the

programming. A complaint must be filed with the video programming provider no later than the end of the calendar quarter following the calendar quarter in which the alleged violation occurred. The video programming provider must provide a written response to a complaint within 45 days after the end of the calendar quarter in which the violation occurred or 45 days after receipt of the complaint, whichever is later. If a video programming provider fails to respond to a complaint or a dispute remains following this initial procedure, a complaint may be filed with the Commission. A video programming provider will have 15 days to respond to the complaint filed with the Commission. If the Commission determines that a violation has occurred, we may impose penalties, including a requirement that the video programming provider deliver programming containing closed captioning in an amount exceeding that required by the rules. We will not adopt any specific recordkeeping requirements. In response to a complaint, however, a video programming provider is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the rules. We also will permit video programming providers to rely on certifications from program suppliers for compliance.

III. Responsibility for Compliance

A. Background

19. In the *Notice*, we proposed to place the responsibility for compliance with our closed captioning requirements on video programming distributors, which we defined as all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities.²⁵ We sought comment as to the possible effect such a rule would have on video programming providers, and the effect that our proposal might have on the diversity of available programming as well as the availability of closed captioned programming.²⁶ We also sought comment as to whether this proposed placement of responsibility might create any anomalous situations.²⁷ In addition, we sought comment on whether the use of the term "program providers and owners" in Section 713 may have been intended to provide the Commission with jurisdiction over producers of video programming,²⁸ given the statement in the legislative history that "[t]he term 'provider' contained throughout [this section] refers to the specific television station, cable operator, cable network or other service that provides programming to the public."²⁹ We solicited comment on the feasibility of having program owners and providers share responsibility for compliance obligations with our closed captioning rules.³⁰

²⁵ *Notice*, 12 FCC Rcd at 1061 ¶ 28.

²⁶ *Id.* at ¶ 30.

²⁷ *Id.*

²⁸ *Id.* at ¶ 29.

²⁹ See House Report at 114.

³⁰ *Notice*, 12 FCC Rcd at 1061 ¶ 29.

20. A variety of commenters, including commenters representing persons with hearing disabilities, support our proposal to place responsibility for compliance on video programming distributors,³¹ noting that we have never exercised direct jurisdiction over networks or producers.³² WGBH notes that efficiency dictates that captioning be done by the original program producers, but asserts that the ultimate responsibility for compliance must rest with a single entity.³³ MPAA claims that holding program owners responsible for closed captioning would require the Commission to "parse complex contractual relationships" to determine which of several entities holding concurrent rights to a particular video product is responsible for a violation.³⁴ MPAA also contends that joint responsibility for captioning would be unworkable because neither consumers nor the Commission would know to whom complaints should be addressed, and both video programming providers and distributors could disclaim responsibility for closed captioning.³⁵ According to MPAA, we should allow the parties' contract negotiations to allocate responsibility, similar to the approach which has proven workable in enforcing children's commercial limits imposed by the Children's Television Act of 1990.³⁶

21. Some commenters representing persons with hearing disabilities assert that placing compliance responsibility on video programming distributors will make it easier for us to monitor and enforce our closed captioning requirements, especially since it will eliminate the need for the Commission to track who produced a particular program.³⁷ At the same time, however, several commenters note that placing responsibility for captioning at the production stage would be the most efficient method for ensuring compliance.³⁸ For example, LHH states that closed captioning when handled by the original program producers will ensure efficiency and accuracy, and will avoid duplication of efforts.³⁹ Similarly, NAD notes that there may be instances where captioning costs could be too burdensome for the

³¹ See, e.g., A&E Comments at 18; ALDA Comments at 2; Allnewsco Reply Comments at 7; CAN Comments at 2; C-SPAN Comments at 6-8; Jordan Comments at 2; MPAA Comments at 2-4; NAD Comments at 2-3; WGBH Comments at 3.

³² A&E Comments at 18; Allnewsco Reply Comments at 7; C-SPAN Comments at 6; MPAA Comments at 2-3.

³³ WGBH Comments at 3.

³⁴ *Id.* at 3.

³⁵ *Id.* at 6.

³⁶ Children's Television Act of 1990, 47 U.S.C. §§ 303a and 303b. Individual broadcast licensees and cable operators are held responsible for compliance under our rules implementing the Children's Television Act, but they often rely on certifications of compliance from program suppliers. MPAA Comments at 4.

³⁷ ALDA Comments at 2; CAN Comments at 2; NAD Comments at 3.

³⁸ See, e.g., ALDA Comments at 2; CAN Comments at 3; Cassidy Comments at 2; MATP Comments at 2; Stavros Reply Comments at 1.

³⁹ LHH Comments at 3.

distributor, but not for the producer, and contends that Congress intended producers to provide closed captioning in such situations.⁴⁰

22. Captivision states that shared responsibility may be appropriate for certain live broadcast programming carried by MVPDs.⁴¹ NCI contends that it may make sense to impose closed captioning responsibility on national or regional video programming distributors with respect to programs they control, but not on distributors that do not control the bulk of their distributed programming.⁴² NCI states that it is important to place captioning responsibility at the point in the production and distribution process where it makes best economic sense to do so.⁴³ Several commenters support joint responsibility for compliance, but generally offer no proposals for how such joint responsibility should be apportioned.⁴⁴

23. Video programming distributors generally oppose our proposal to make them primarily responsible for compliance with our closed captioning rules.⁴⁵ A number of commenters cite the statute's explicit references to program "owners" in Section 713 as support for our jurisdiction over such entities.⁴⁶ Distributors assert that the consensus that closed captioning can be most efficiently and accurately accomplished at the production stage dictates placement of the captioning burden on producers, not distributors.⁴⁷ In light of our assumption that distributors could transfer closed captioning responsibility to producers by refusing to purchase uncaptioned programs, AlphaStar asserts that we should just place the compliance burden on producers.⁴⁸ Encore argues that distributors are unlikely to be able to pass captioning responsibility on to producers by simply refusing to purchase uncaptioned programs in light

⁴⁰ NAD Comments at 2-3.

⁴¹ Captivision Comments at 2-3.

⁴² NCI Comments at 13.

⁴³ *Id.* at 14.

⁴⁴ AIM Comments at 1; California Comments at 4 ("supports shared responsibility such that producers caption and [distributors] enforce compliance by the producers from whom they purchase programs"); The Coalition Comments at 8; MATP Comments at 2; Stavros Reply Comments at 1.

⁴⁵ See, e.g., ALTV Comments at 6; Ameritech Comments at 5-11; Bell Atlantic Reply Comments at 2; BellSouth Comments at 5-8; Cox Comments at 5; DirecTV Comments at 4-6; NAB Comments at 2-3; SBC Comments at 2-4; SBCA Comments at 3-8; TCI Reply Comments at 2-7; Time Warner Reply Comments at 3-5; US West Comments at 9-12.

⁴⁶ Ameritech Comments at 9; BellSouth Comments at 6; CBS Comments at 8-10; Cox Comments at 3-4; SBC Comments at 3; WCA Comments at 5. *But see* C-SPAN Comments at 7: A "nearly offhand statement in the legislative report does not constitute a sufficient basis upon which to break such jurisdictional ground [i.e., for the Commission to assert authority over producers and copyright holders of programming] and particularly so with respect to the content of speech produced, owned or distributed by entities not now subject to such jurisdiction."

⁴⁷ See, e.g., Cox Comments at 4; DirecTV Comments at 4; GTE Comments at 3; NAB Comments at 2-3; WCA Comments at 4-5.

⁴⁸ AlphaStar Comments at 7.

of the current video programming marketplace. Encore claims that contracts with producers typically extend for seven year terms, and that refusal to accept a particular film or program may breach a long-term contract and could force a distributor to find other programming to fill a spot at considerable, duplicative expense.⁴⁹

24. Several MVPDs, including satellite and wireless cable distributors, raise concerns specific to their medium.⁵⁰ Satellite distributors argue that they typically have little or no control over the programs which they distribute and that they merely obtain the right to retransmit programming, unaltered and in its entirety, through retransmission and affiliation agreements, but do not purchase programming directly from producers.⁵¹ AlphaStar claims that the general terms of its programming distribution licenses prohibit it from adding captions, as its licenses require AlphaStar to retransmit programs in their entirety, without deletion or modification.⁵² TCI contends that its affiliation agreements explicitly reserve to the programmer all rights not specified in the agreement, and that the right to caption the programming is not granted to TCI in any of those agreements.⁵³ Primestar maintains that DTH distributors are technically incapable of producing captions and inserting them after a program has been created due to the mechanics of DTH transmission and technical configuration of the systems themselves.⁵⁴ Time Warner argues that cable operators who refuse to carry leased access programming, must-carry stations or public, educational or governmental ("PEG") access programming due to lack of closed captioning could be in violation of the Communications Act or franchise or retransmission consent agreements.⁵⁵

25. In addition, several distributors argue that copyright law may prevent them from closed captioning the programming they distribute. United Video maintains that Section 119(a)(4) of the Copyright Act of 1976⁵⁶ "forbids any willful alteration of the content of any satellite broadcast signal secondarily transmitted by a satellite carrier," and argues that any material related to a particular program which a satellite carrier might insert into line 21 would constitute an alteration of the broadcast signal and thus copyright infringement.⁵⁷ USSB is concerned that it might violate intellectual property rights if it captions someone else's work.⁵⁸ AlphaStar and Bell Atlantic claim that permission from the original

⁴⁹ Encore Comments at 6.

⁵⁰ See, e.g., AEC Reply Comments at 4-6; BellSouth Comments at 8-10; DirecTV Comments at 5-6; SBCA Comments at 8; WCA Comments at 6-10.

⁵¹ SBCA Comments at 4 and 6; WCA Comments at 6-7.

⁵² AlphaStar Comments at 6-7 and n. 3.

⁵³ TCI Reply Comments at 6-7.

⁵⁴ Primestar Comments at 3-4.

⁵⁵ Time Warner Reply Comments at 4.

⁵⁶ 17 U.S.C. § 119(a)(4).

⁵⁷ United Video Comments at 3-4; see also AEC Reply Comments at 4-6.

⁵⁸ USSB Comments at 6 and n. 5.

author to publish the dialogue of a video program may be needed to avoid copyright infringement issues.⁵⁹

26. Finally, a number of commenters express concern that program owners or producers might not offer captioned programming to all distributors, forcing smaller distributors with less bargaining power to caption programming that is offered to other distributors already captioned.⁶⁰ Several commenters urge us to prohibit discrimination against any distributors by requiring program owners and producers or syndicators to offer captioned programming equally to all distributors.⁶¹

B. Discussion

27. Both Section 713 and the legislative history indicate that Congress intended to give us sufficient jurisdiction to ensure the accessibility of video programming. Section 713 refers to the closed captioning of programming by providers and owners of video programming.⁶² The legislative history defines the term "providers" to include the specific television station, cable operator, cable network or other service that provides programming to the public.⁶³ We believe that we should craft our captioning rules in a manner that will increase the availability of video programming with closed captions most expeditiously as well as focus compliance responsibility. In order to accomplish these goals, we believe it desirable to hold video programming distributors, defined as all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities, responsible for compliance with our closed captioning rules. Accordingly, broadcasters, cable operators, wireless cable operators, ITFS or LMDS, SMATV operators, DBS providers, DTH providers, HSD providers and OVS operators will be responsible for compliance with our rules. We believe that placing compliance obligations on distributors will allow us to monitor and enforce these rules more efficiently. By holding distributors responsible for captioning, there typically will be a single entity to which complaints must be addressed, and there will be no need for tracking the entities responsible for producing programs alleged to violate the rules. However, as described below, we will measure compliance with our closed captioning on the basis of each channel of video programming provided to consumers.

28. Although we are placing the ultimate responsibility on program distributors, we expect that distributors will incorporate closed captioning requirements into their contracts with producers and owners, and that parties will negotiate for an efficient allocation of captioning responsibilities. The references to program "owners" in Section 713 reflect Congress' recognition that it is most efficient to caption programming at the production stage, and the assumption that owners and producers will be

⁵⁹ AlphaStar Comments at 6-7; Bell Atlantic Reply Comments at 3.

⁶⁰ See, e.g., BellSouth Comments at 19-20; NCD Comments at 5; SBC Comments at 6; WCA Comments at 16-17.

⁶¹ BellSouth Comments at 19; NCD Comments at 5; SBC Comments at 6; WCA Comments at 17.

⁶² See, e.g., Sections 713(b)(2), (d)(2) and (d)(3).

⁶³ House Report at 114.

involved in the captioning process.⁶⁴ We therefore expect that program owners and producers will cooperate with distributors to ensure that nonexempt programming is closed captioned in accordance with our rules. We will allow distributors to demonstrate compliance with these rules by relying on certifications from program sources, such as producers, networks or syndicators, that expressly state that the programming is either captioned or exempt from our closed captioning rules, similar to the rules concerning commercial limits imposed by the Children's Television Act of 1990.⁶⁵ Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. We anticipate that it would be reasonable for video programming providers to rely on the accuracy of certifications, and we would take appropriate action if there were deliberate falsifications.

29. In some instances, a program distributor is prohibited by law from exercising editorial control over certain types of programming it offers, such as public, educational and governmental ("PEG") or leased access.⁶⁶ In these situations, the distributor shall be exempt from captioning such programming. Thus, for example, a satellite provider that secondarily transmits broadcast signals pursuant to the compulsory copyright licensing provisions of Section 111 and 119 of the Copyright Act⁶⁷ will not be required to caption those signals, nor will a distributor be required to caption PEG, leased access or must-carry programming that is delivered to the provider uncaptioned. Distributors will not be penalized for transmitting such programming without captions, and need not refuse to carry such programming due to lack of captions where an addition of captions or refusal to carry could violate the Communications Act or their franchise or retransmission consent agreements. Instead, video program producers and owners will be responsible for captioning in situations where the program distributors may not refuse to carry the programming pursuant to Federal law, to the extent the programming is not otherwise exempt under the rules we adopt in this *Report and Order*.

30. We believe that commenters' concerns that producers will refuse to caption programming before delivery to the distributor are overstated. The video programming industry, providers and producers alike, must adapt to the changes mandated by Section 713. Cooperation between video programming distributors and producers is necessary if video programming is to be captioned as required by Section 713. Video programming providers may no longer view closed captioning as an option in the production process, but as a requirement, the cost of which must be factored in with the costs and budgets for video programming generally. Our captioning rules will be applied to all distributors, which will prevent producers and program suppliers from "shopping around" for distributors who have no closed

⁶⁴ We also believe Congress' reference to "cable networks or other service" as a type of video programming provider in the legislative history of the statute reflects this assumption. See House Report at 114.

⁶⁵ See 47 C.F.R. § 73.3526(a)(8)(ii) (requiring television broadcast licensees and cable operators to maintain records sufficient to verify compliance with the commercial limits imposed by 47 C.F.R. § 73.670).

⁶⁶ See, e.g., §§ 315 (political candidates' broadcasts), 335 (noncommercial, educational and informational programming carried by DBS operators), 611 (PEG programming), 612 (leased access programming), 614 (must-carry) and 615 (local noncommercial educational programming carried by cable operators) of the Communications Act (47 U.S.C. §§ 315, 335, 531, 532, 534 and 535); §§ 111 and 119 of the Copyright Act (17 U.S.C. §§ 111 and 119).

⁶⁷ 17 U.S.C. §§ 111 and 119.

captioning obligations. There will be few, if any, outlets for programming that are not captioned as the transition period progresses. The inherent need to increase viewership will create an incentive for many program owners and producers to provide captioning to gain carriage on other systems. Thus, we believe the realities of the marketplace will result in shared responsibility for the closed captioning of video programming, although ultimate responsibility for compliance will generally be on the video programming distributor who distributes the programming to viewers.

IV. TRANSITION RULES

A. Transition Rules for New Programming

1. Background

31. Transition Schedules. We proposed an eight-year transition schedule for programming first published or exhibited after the effective date of our rules ("new programming"), which would phase in closed captioning of all non-exempt new programming by 25% increments every two years.⁶⁸ We also offered an alternative proposal under which closed captioning of non-exempt new programming would be phased in over ten years, with 25% captioned after three years, 50% after five years, 75% after seven years, and 100% after ten years.⁶⁹ Under our proposal, program providers would have significant discretion regarding what to caption to meet the requirements and how to use funding available for captioning.⁷⁰ We noted that the level of captioned programming currently offered by some programmers may exceed these benchmarks, and that we expected current levels of closed captioning to continue.⁷¹

32. Numerous commenters, including video programming distributors and providers, captioners and deaf advocates, support the proposed eight-year⁷² or ten-year schedules.⁷³ In addition, some commenters find merit in both proposals.⁷⁴ NCD states that eight years "may be the shortest practicable" transition schedule, but that we should adopt a ten-year schedule if the relevant industry groups could guarantee that all new programming would be made fully accessible in that time span.⁷⁵

⁶⁸ Notice, 12 FCC Rcd at 1066 ¶ 41.

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 42.

⁷¹ *Id.*, 12 FCC Rcd at 1067 ¶ 46.

⁷² California Comments at 2; Captivision Comments at 2; CBS Comments at 7; MCS Comments at 2; NAB Comments at 4; Pittsburgh Comments at 2; Stavros Reply Comments at 2; WGBH Comments at 4.

⁷³ A&E Comments at 21; Ameritech Comments at 12; DirecTV Comments at 6-7; HBO Comments at 7; MPAA Comments at 10; NCTA Comments at 10; Paxson Reply Comments at 3-4; RTNDA Comments at 6; US West Comments at 13-14.

⁷⁴ See, e.g., ABC Comments at 7; APTS Comments at 7; NCD Comments at 1-2.

⁷⁵ NCD Comments at 1-2. Although NCD recognizes that exemptions may be granted under the undue burden process, it urges us to sparingly exercise our authority to grant blanket exemptions in this proceeding. *Id.* at 3.

33. Several commenters qualify their support for the proposed transition schedules, based on our adoption of certain requested exemptions,⁷⁶ a decision not to adopt non-technical quality standards,⁷⁷ or the application of the rules to program owners.⁷⁸ NCD recommends that distributors show some evidence of progress each year, aggregating to 25% every two years.⁷⁹ Similarly, Captivision contends that we should require some increase in closed captioning levels within the first year after the rules become effective, if we adopt the eight-year transition period.⁸⁰ MCS supports adoption of the proposed eight-year transition period, provided that we use current captioning levels as the starting point from which the amount of captioned programming would be increased.⁸¹

34. Commenters that oppose our proposals primarily represent persons with hearing disabilities.⁸² They propose alternative implementation schedules generally ranging from one to five years.⁸³ Many commenters argue that shorter time frames are reasonable because closed captioning technology has been available for 20 years;⁸⁴ the technology is widely available and affordable;⁸⁵ caption services are abundant and competitive;⁸⁶ and programmers and owners have been aware that they would be required to provide closed captioning since the passage of the 1996 Act.⁸⁷

⁷⁶ ABC Comments at 7; NAB Comments at 4.

⁷⁷ NAB Comments at 4.

⁷⁸ Ameritech Comments at 12.

⁷⁹ NCD Comments at 2.

⁸⁰ Captivision Comments at 2.

⁸¹ MCS Comments at 2; *see also* NCI Reply Comments at 2. In contrast, ALTV claims that a rule requiring that currently captioned programs remain captioned is unnecessary, because the proposed benchmarks will ultimately result in most programming being captioned. ALTV Comments at 7-8.

⁸² *See, e.g.*, AAAD Comments at 2; Cassidy Comments at 1; Council of Organizational Representatives Reply Comments at 2-3; Hear Ink Reply Comments at 1; LHH Comments at 3; Nova West Comments at 1; SHHH Comments at 2.

⁸³ *Id.*

⁸⁴ ALDA Comments at 2; Cassidy Comments at 3; Cotter Comments at 1; MATP Comments at 2; NAD Comments at 4; NCD Comments at 2; Nova West Comments at 1.

⁸⁵ CAN Comments at 3; Cotter Comments at 1; MATP Comments at 2; NAD Comments at 4; NCD Comments at 2; SHHH Comments at 3.

⁸⁶ LHH Comments at 3; MATP Comments at 2; NCD Comments at 2.

⁸⁷ ALDA Comments at 3; CAN Comments at 3; MATP Comments at 2; NCD Comments at 2; SHHH Comments at 3.

35. SHHH notes that the proposed schedules would allow major networks to do nothing for the first seven years, and could allow them to decrease current levels of closed captioning.⁸⁸ Numerous commenters assert that the percentage increments should be over and above current captioning levels.⁸⁹ WGBH argues that it is unlikely that Congress intended Section 713 to result in a cutback in current closed captioning levels, and recommends using February 8, 1996, as the baseline upon which the 25% thresholds are added.⁹⁰ In addition, several commenters express doubt about the continuance of current captioning levels, and note that reductions in closed captioning have occurred already.⁹¹

36. A number of commenters suggest that our final benchmark for closed captioning of non-exempt new programming should be less than 100%.⁹² Some of these commenters propose that allowing "substantial compliance" with our closed captioning rules will ease the burden on distributors⁹³ and lessen the drain on Commission resources engendered by requests for individual exemptions under Section 713(d)(3).⁹⁴ Other commenters claim that without a "*de minimis*" exemption a distributor would have no time to request an exemption when a program is received shortly before its scheduled air time and is uncaptioned, and the programming might simply be pulled from the schedule.⁹⁵ Alternatively, these commenters claim that such situations could arise quite frequently, and that we would therefore be overwhelmed with individual exemption requests, as it will be difficult to anticipate and address in this proceeding every valid exemption situation that could arise in the future.⁹⁶ The proposed "*de minimis*"

⁸⁸ SHHH Comments at 3-4.

⁸⁹ ALDA Comments at 3; CAN Comments at 4; Council of Organizational Representatives Reply Comments at 3; LHH Comments at 3; NAD Comments at 5; NCD Comments at 3; NCI Comments at 9. *But see* Lifetime Reply Comments at 3 (it would be unfair to hold those programmers who have voluntarily captioned to a higher standard than those who have done less or no captioning at all).

⁹⁰ WGBH Comments at 4; *see also* NCD Comments at 3. NCD would allow distributors to specify their own baseline levels of captioning and use those figures as the point of departure for the required increases in captioning. NCD Comments, *id.*

⁹¹ *See, e.g.,* ALDA Comments at 3 ("heard reports" that USA Network and CNBC have stopped captioning some programs); MCS Comments at 2; NVRC Comments at 3.

⁹² *See, e.g.,* ALTV Comments at 8-10; BellSouth Reply Comments at 11; CAN Reply Comments at 7-8; C-SPAN Comments at 12-13; E! Comments at 6-7; Encore Comments at 8; HBO Comments at 9-12; Lifetime Reply Comments at 7-8; NCTA Comments at 12; TVFN Comments at 6; Viewer's Choice Comments at 4-5.

⁹³ *See, e.g.,* ALTV Comments at 8-9; C-SPAN Comments at 13; HBO Comments at 10-11; NCTA Comments at 13; TVFN Comments at 6.

⁹⁴ *See, e.g.,* ALTV Comments at 9; Encore Comments at 8; Viewer's Choice Comments at 5-6.

⁹⁵ NCTA Comments at 13; HBO Comments at 10.

⁹⁶ *See, e.g.,* HBO Comments at 12; NCTA Comments at 13; Viewer's Choice Comments at 5-6.

or "substantial compliance" thresholds range from 80% to 98% captioning of all non-exempt new programming.⁹⁷

37. Closed Captioning Priorities. We solicited comment on whether certain types of programming should be subject to an accelerated implementation schedule.⁹⁸ We also noted that a significant portion of funding for current levels of closed captioning comes from DOE grants and the availability of such funding in the future is unclear, which could affect the amount of captioning that can be provided.⁹⁹ We asked commenters to consider whether other factors, including the type of programming, the time of day the program is offered, audience size, the type of program provider, the number of households served by the distributor (e.g., homes in the television market or homes passed by the cable system), or some combination of these factors should be incorporated into our phase in schedules or be the basis of alternative proposals.¹⁰⁰

38. With respect to possible earlier implementation of closed captioning for certain types of programming, comments from organizations representing persons with hearing disabilities strongly support priority captioning of news, emergency announcements, current affairs and educational programs,¹⁰¹ while comments from others support our proposal to let providers decide what programs should be captioned first.¹⁰² MCS and HBO agree that programmers should have discretion in determining how best to allocate closed captioning resources.¹⁰³ HBO also claims that market forces will continue to be the significant catalyst for captioning that such forces have been to date, ensuring that the most desirable programming will be captioned first.¹⁰⁴ C-SPAN contends that the "spoken word intensive character" of news and public affairs programming supports the need for a longer transition period for closed captioning of such programming.¹⁰⁵ NACDA claims that sports programming should be given a later implementation schedule than other programming so that scarce live captioning resources can be devoted to news and public affairs programming first.¹⁰⁶

⁹⁷ CAN Reply Comments at 8 (97%); C-SPAN Comments at 13 (80%); Encore Comments at 8 (98%); HBO Comments at 12 (80%); Lifetime Reply Comments at 7 (90-95%); NCTA Comments at 13 (90%).

⁹⁸ Notice, 12 FCC Rcd at 1066 ¶ 42.

⁹⁹ *Id.*, 12 FCC Rcd at 1067 ¶ 46.

¹⁰⁰ *Id.* at ¶ 50.

¹⁰¹ See, e.g., AIM Comments at 3; ALDA Comments at 3; CAN Comments at 4; The Coalition Comments at 4; Kaleidoscope Comments at 3; NAD Comments at 6; NVRC Comments at 7; SHHH Comments at 4; Stavros Reply Comments at 2.

¹⁰² See, e.g., C-SPAN Comments at 8-9; HBO Comments at 12-13; MCS Comments at 3.

¹⁰³ MCS Comments at 3; HBO Comments at 12.

¹⁰⁴ HBO Comments at 13.

¹⁰⁵ C-SPAN Comments at 8-9.

¹⁰⁶ NACDA Comments at 17-18.

39. Captivision contends that current closed captioning levels should not be reduced, regardless of the availability of federal funds for captioning. This commenter claims that DOE funding for captioning was intended merely to "kick-start" the captioning process and allow stations to garner their own financial support for closed captioning.¹⁰⁷ MCS expresses concern that the proposed transition rules will allow programmers the flexibility to reduce their captioned programming if the level of federal support for closed captions decreases.¹⁰⁸ MCS submits that this could result in a net reduction of the current level of captioned hours, which would be inconsistent with the intent of the statute.¹⁰⁹

40. NCI proposes that a distinction be made between programs with large and small potential audiences.¹¹⁰ NCI contends that such a distinction makes economic sense because the cost of closed captioning widely available programming is *de minimis* in relation to production costs and distribution revenues of such programming. NCI submits that where the video market is large and captioning costs are low, a significant time lag for implementation of closed captioning is unnecessary and illogical.¹¹¹ In addition, NCI states that video programming distributors or providers that do not voluntarily caption programming intended for wide audiences should be required to caption programs reaching wide audiences first and then caption other types of programming.¹¹² Allnewsco contends, however, that market size and geographic location bear no relationship to the burden of closed captioning on a particular type of programming.¹¹³

2. Discussion

41. We adopt an eight year transition period for video programming first published or exhibited after the effective date of our rules ("new programming"). During this transition period, distributors will be required to increase over time the amount of closed captioned video programming they distribute until full accessibility of new programming is achieved. Our goal, consistent with the intent of Section 713, is to make all new video programming fully accessible as soon as possible. However, we must take into consideration that this goal cannot be reached immediately due to the limited number of available captioners and captioning services in existence, the increased demand for captioning which will be created by Section 713, and the cost of captioning. With respect to cost, we note that the cost of captioning varies with the type of programming and method used. As we reported to Congress, off-line captioning of prerecorded programming is estimated to be between \$800 and \$2500 an hour.¹¹⁴ For live

¹⁰⁷ Captivision Comments at 3; *see also* Stavros Reply Comments at 2.

¹⁰⁸ MCS Comments at 3.

¹⁰⁹ *Id.*

¹¹⁰ NCI Comments at 11.

¹¹¹ *Id.*

¹¹² *Id.* at 12.

¹¹³ Allnewsco Reply Comments at 6.

¹¹⁴ *Report*, 11 FCC Rcd at 19232-19233 ¶ 47.

programming requiring real time stenocaptioning, cost estimates range from \$120 to \$1200 an hour.¹¹⁵ For scripted live programming that uses a teleprompter from which captions can be created, the cost of installing the captioning capability, referred to as electronic newsroom, is between \$2500 and \$5000.¹¹⁶ We also note that, according to NCI, the cost of captioning all types of video programming has decreased considerably over the past several years.¹¹⁷ Further, we are also concerned that requiring distributors to implement captioning immediately could reduce the availability of certain types of video programming in the near term, or pose implementation problems where distributors and producers have entered into long term contracts which do not address the responsibility for captioning. We believe that the rules we adopt provide a balanced approach that will result in full accessibility in a reasonable amount of time with significant increases as captioning is phased in. Allowing a transition to full captioning to occur over a period of years will help to ensure that the goal of the statute is met in an efficient and practical manner.

42. We are not convinced by those commenters arguing for a shorter transition period than either of those we proposed in the *Notice*. We agree that closed captioning technology has been available for many years, and that the video industry has been aware since the passage of the 1996 Act that closed captioning would no longer be voluntary. However, we recognize that existing closed captioning resources may not be able to achieve full accessibility immediately. The record in this proceeding demonstrates that although there may be sufficient captioning resources available to meet current demand, the amount of closed captioning to be undertaken in compliance with our rules will significantly increase demands on these resources. For example, while the broadcast networks and the most widely available and popular non-broadcast networks caption significant amounts of their programming, a large amount of programming will be captioned for the first time.¹¹⁸ We note that the number of captioners, especially the number of real time stenocaptioners needed for live programming, is currently limited. While we expect the pool of captioners to expand to meet the increased demand for closed captioning, that expansion is dependent on individuals acquiring captioning skills. We are also not persuaded that a longer transition period offers significant advantages over an eight year period.

43. Our rules will require that, at the end of the transition period, 95% of all new programming that does not fall within any of our exemptions will be closed captioned. Because we recognize that there are unforeseen difficulties that could arise that might unintentionally result in video programming providers being unable to provide such new programming with captions, we believe it is reasonable to define full accessibility at the end of the transition period as slightly less than 100% of all new nonexempt programming. The 95% requirement provides some leeway to accommodate these difficulties. Although the statute uses the term "fully accessible" in describing the amount of new programming to be captioned under our rules, the statute also includes provisions for exemptions from the captioning rules, an acknowledgement that some new programming will not be captioned. In addition, the legislative history states that "the Committee expects that most new programming will be closed

¹¹⁵ *Id.* at 19233 ¶ 48. In ENR captioning, the captions are created from the script that is fed into a station's teleprompter, using special hardware and software. Only the scripted portions of the live program will contain captions if a station uses the ENR method. *See also Notice*, 12 FCC Rcd at 1058 ¶ 21.

¹¹⁶ *Id.* at 19235 ¶ 52.

¹¹⁷ *Id.* at 19232-19233 ¶¶ 47-48. *See also* NCI Comments at 3 and Exhibit 1 (sample rate card).

¹¹⁸ *See* paras. 8-10 *supra*.

captioned,"¹¹⁹ indicating Congress' recognition that something less than all new programming would be captioned. A final requirement that at least 95% of all new nonexempt programming be captioned will ease the burden on distributors that receive programs without captions shortly before their scheduled air times, allowing distributors to air such programs without having to seek last-minute waivers, and will also accommodate occasional technical lapses which may occur due to circumstances beyond a distributor's control.¹²⁰

44. The transition schedule will phase in closed captioning for new nonexempt video programming until full accessibility is reached after the end of the eight year transition period. We believe that some time is needed to permit video programming distributors sufficient time to determine the availability of programming with closed captioning and to make whatever arrangements are necessary to ensure that they are able to provide programming with closed captioning to viewers in compliance with our requirements. Therefore, the initial benchmark for captioning is set for the first calendar quarter of 2000. Beginning with the first calendar quarter of 2000, distributors will be required to meet increasing closed captioning benchmarks for new nonexempt programming.

45. We establish three benchmarks during the transition period. As described below, compliance with and measurement of these benchmarks will be determined on a per channel and calendar quarter basis. (Also as described below, video programming providers will be permitted to treat as exempt up to four hours of late night programming.) These benchmarks are based on average amounts of required captioning of new nonexempt programming of approximately five hours per day after two years, ten hours per day after four years and 15 hours per day after six years. These requirements are measured over the course of the calendar quarter, so, for example, the first benchmark requires that at least 450 hours of new nonexempt programming be captioned per calendar quarter in 2000 and 2001.¹²¹ We recognize that many channels provide a mix of new, pre-rule and exempt programming and we believe that all channels should be afforded the benefit of captioning 95% rather than 100% of new nonexempt programming. Therefore, our rules provide that, when the closed captioning requirements specified in our rules exceed the number of hours of new nonexempt programming on a channel during the calendar quarter, 95% of the new nonexempt programming on such channel must contain captions. For example, during the first calendar quarter of 2002 (i.e., January, February and March 2002), if a channel has 850 hours of new nonexempt programming (an amount less than the 900 hours benchmark requirement), then it is in compliance if 807½ hours (95% of 850) are captioned. We expect video programming distributors to plan to deliver to consumers captioned programming sufficient to maintain the needed flexibility for the occasional situations where unintended difficulties arise.

46. Finally, notwithstanding the specific transition requirements and the exemptions otherwise provided for in the rules, in order to make sure that the level of captioning is generally increasing, we will also require video programming providers to continue to provide closed captioning at level substantially

¹¹⁹ House Report at 114.

¹²⁰ Distributors will be required to ensure that their own technical facilities are in proper working order. See also para. 212 *infra*.

¹²¹ The second benchmark requires that 900 hours of new nonexempt programming must be captioned during each calendar quarter in 2002 and 2003. The third benchmark requires that 1350 hours of such programming per calendar quarter contain captioning in 2004 and 2005.

the same as the average level of captioning that they provided during the first six months of 1997, even if the amount of captioned programming exceeds that requirement under the benchmarks.¹²² We reject, however, the implicit suggestion of some of the commenting parties that entities that already captioned large amounts of programming should be required to complete the transition process at an earlier date.

47. Finally, we decline to adopt an expedited schedule for captioning of any particular type of programming. Although we recognize the importance of, for example, news and community affairs programming to viewers, we believe that distributors can best determine what programs to caption first, and we expect that consumer demand, among other factors, will be taken into account in making those determinations. We wish to emphasize that the ultimate goal of the statute is to make video programming accessible to persons with hearing disabilities, which we believe is accomplished by our rules. All new programming, less the 5% allowance for unforeseen difficulties, will be captioned after the transition period. This will represent a significant increase in the amount and variety of captioned programming available to viewers with hearing disabilities.

B. Transition Rules for Pre-Rule Programming

1. Background

48. In the *Notice*, we referred to the statutory distinction between the closed captioning requirements for programming first published or exhibited after the effective date of our rules ("fully accessible")¹²³ and programming first published or exhibited before that date ("maximize accessibility").¹²⁴ Because of this distinction, we believe that Congress did not intend that all programming published prior to the effective date of our rules would be captioned.¹²⁵ We also noted that a requirement that nearly all programming be captioned could present a significant burden, as well as the possibility that distributors would elect to remove older, uncaptioned programming from their scheduled offerings rather than captioning such programs. We sought comment on whether our rules should require that a percentage of pre-rule programming, perhaps 75%, ultimately be captioned or whether it may be unnecessary to require that pre-rule programming be captioned by a date certain.¹²⁶

49. Definition. Several commenters seek clarification of the definition of pre-rule programming. For example, MPAA, HBO and Viacom suggest clarifying our definition of pre-rule programming such that "first published or exhibited" refers to the time when the work was first publicly

¹²² We will expect reasonable compliance with this provision and recognize that differences in programming schedules may result in the need to approximate previous levels.

¹²³ 47 U.S.C. § 613(b)(1).

¹²⁴ 47 U.S.C. § 613(b)(2). Although we referred to programming first published or exhibited prior to the effective date of our rules as "library programming" in the *Notice*, the term "library" created significant confusion among the commenters. We will now use the term "pre-rule programming" to refer to such programming.

¹²⁵ *Notice*, 12 FCC Rcd at 1070 ¶ 57.

¹²⁶ *Id.*, 12 FCC Rcd at 1071 ¶¶ 58-59.

distributed in its original form in any medium.¹²⁷ These commenters would define programs first exhibited in any medium prior to August 8, 1997 as "pre-rule programming" for the purposes of our rules.¹²⁸ Thus, theatrical films and home videos first publicly distributed prior to the effective date of our rules would not be considered "new programming," even though such works might first be aired on television after the effective date of the rules.¹²⁹ NCD asks whether colorizing, remastering or otherwise restoring or modifying a vintage film "in accordance with contemporary technology and tastes" would transform the film from pre-rule programming to new material.¹³⁰ NCD claims that, even if such modifications are not deemed to re-classify the material as new programming for the purposes of our rules, in many cases the costs of captioning may represent only a small portion of or minor addition to the overall modification costs, making economic arguments against captioning less persuasive in such situations.¹³¹ MPAA and NCTA contend that a reformatted version of a previously-published program should not be re-categorized as "new."¹³²

50. MPAA and Viacom argue that once a new program is ten years old, it should no longer be considered new and should be subject to the less stringent standard,¹³³ while HBO would remove a program from the new category one year after it is first exhibited.¹³⁴ MPAA and Viacom claim that, as new programs age, their value diminishes, and eventually the burden of captioning or reformatting existing captions becomes uneconomical.¹³⁵ HBO contends that it would be illogical for all programs first publicly distributed after October 31, 1997 to be considered "new" in perpetuity.¹³⁶

¹²⁷ MPAA Comments at 13; HBO Comments at 5-6 and 16; Viacom Reply Comments at 7-8.

¹²⁸ *Id.* We note that these commenters inaccurately use the date by which rules must be adopted, rather than the actual effective date of the rules, as the dividing line between pre-rule and new programming. The statute specifically refers to "programming first published or exhibited prior to the effective date of such regulations . . . " 47 U.S.C. § 613(b)(2).

¹²⁹ *Id.*

¹³⁰ NCD Comments at 7; *see also* NAD Reply Comments at 4.

¹³¹ *Id.*

¹³² MPAA Comments at 13; NCTA Comments at 28, n. 58.

¹³³ MPAA Comments at 13; Viacom Reply Comments at 8-9.

¹³⁴ HBO Comments at 16.

¹³⁵ MPAA Comments at 13-14; Viacom Reply Comments at 8-9.

¹³⁶ HBO Comments at 16. HBO states that, under its proposal, each network would classify "new" programs as new or library depending on when rebroadcasts of the programs occurred on that network; HBO claims it will be easier for networks to maintain records of the dates of exhibition than to refer to outside sources for program release dates. *Id.*